IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of case

Criminal Appeal No. 978 of 2001, decided on 18.12.2003

Bashir Vs. State

A.F.R. (Approved for reporting)
Not approved for reporting

Date 18-12-2003 Initials of Judge

Note:- Bench Reader will attach this at the top of the first page of the judgement when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No. 978 of 2001

Bashir son of Habibulla,
Resident of D-16 Bhandari Bagh,
P.S. Kotwali Dehradun .....Appellant.

Vs.

State ....Respondent.

Sri Vinod Sharma learned counsel for the appellant.

Sri D.K.Sharma learned A.G.A. for the respondent.

Date: 18-12-2003

ORAL JUDGEMENT **(Per Hon. Irshad Hussain, J.)**

This is an appeal against the judgment dated 10-2-1983 passed by Sessions Judge, Dehradun in Sessions Trial No. 66/1982, whereby the appellant Bashir was convicted and sentenced to undergo R.I. for seven years under section 307 I.P.C. and R.I. for ten years under section 304 (Part-II) I.P.C. Both the sentences were directed to run concurrently.

2- Appellant used to sell vegetables as a hawker on his hawker-cart (Theli) in the town of Dehradun. On 18-5-1982 at about 11 a.m. he was carrying his vegetable hawker-cart in Moti Bazar at a distance of about two furlongs from P.S. Kotwali Dehradun. At that time Sushil Kumar Sharma (P.W.1) carrying his ironed clothes collided against hawker-cart. The clothes were spoiled as these fell on the ground. It resulted in exchange of hot words between these two. However, appellant went away by giving threat to Sushil Kumar Sharma that he will be seen later-on. After this incident the appellant along with his companions continued to keep watch on his said opponent by remaining in and around that locality where the father of Sri Sharma had his photo-frame shop. The same day, at about 8 p.m. Sushil Kumar Sharma was going on a bicycle towards his maternal grand uncle's house, the appellant came from behind, pulled off the bicycle, took out a pistol and fired shot hitting the said Sushil Kumar Sharma and a passer-by. The passer-by was identified as Jai Bhagwan

who later-on succumbed to the fire arm injuries at about 7 p.m. on 19-5-1982 while he was in the hospital under treatment.

3- F.I.R. (Ext. Ka. 1) of the case was lodged at 9.20 p.m. on 18-5-1982 by Kishan Chand Sharma (P.W.3) the father of the injured Sushil Kumar Sharma (P.W.1). The investigation of the case was taken up by S.I. Prempal Singh (P.W.7) who recorded the statement of P.W.3 at the police station and thereafter went to Doon Hospital, Dehradun to record the statements of the two injured. He recorded the statements of other witnesses of the locality. On receiving the memo the death of Jau Bhagwan the inquest on the dead body was held and inquest report (Ext.Ka.3) and relevant documents (Ext.Ka.4 to Ext.Ka.7, Ext.Ka.9 and Ext. Ka.10) were also prepared. Autopsy was conducted the same day at 11.30 a.m. by Dr. K.K.Singh (P.W.5) and who prepared autopsy report (Ext.Ka. 3). On completion of the investigation charge sheet (Ext.Ka.15) was submitted against the appellant.

4- The appellant did not admit the accusations of the prosecution and urged that he has been implicated in the case due to some misunderstanding.

5- At the trial prosecution examined 8 witnesses in order to bring home guilt to the appellant. Of these witnesses, P.W.1, Sushil Kumar Sharma is the injured of the case. P.W.2, Ram Bhakta Shastri, P.W.3, Kishan Chand Sharma the father of the injured, P.W.4, Babu Ram and P.W.6, Ghanshyam are the eye witnesses of the occurrence and they narrated the prosecution version disclosed above. P.W.5, Dr. K.K.Singh while proving the autopsy report (Ext.Ka.13) of deceased Jai Bhagwan also testified that the death of the deceased occurred due to shock and haemorrhage as a result of gun shot wounds and associated internal injuries. He also gave out that ante-mortem injuries correspond to the injuries noted in the injury repot (Ext. Ka.24). He also proved that the deceased sustained gun shot injuries probably at about 8 p.m. on 18-5-1982. As stated above P.W.7, S.I. Prempal Singh has investigated the case and he proved various stages of the investigation and formalities completed thereof till submission of the charge sheet against the appellant. P.W.8, Dr. B.C. Ramola medically examined injured Sushil Kumar Sharma at 8.45 p.m. on 18.5.1982 and prepared and injury report (Ext. Ka. 21). He detected gun shot entry wounds with irregular and inverted margins on the left fore-arm, on the front side neck, on the front right side chest joint below the manubrium sterni, on the right shoulder medial aspect and on the right upper arm. Blackening and charring was present with fresh bleeding.

Besides the above, two gun shot exit wounds on the back of left fore-arm were also detected. These have irregular and everted margins.

In the opinion of the Medical Officer these injuries were probably caused at about 8 p.m. on 18-5-1982 and the gun shot injuries were caused from single fire when the shot was fired from a distance of about 4 feet.

6- This all was the evidence adduced by the prosecution. No evidence was, however, adduced in defence.

7- The learned Sessions Judge on his appreciation of the evidence accepted the claim of the prosecution but found the charge of murder not proved against the appellant. Since the appellant had not intended to cause injuries to the passer-by Jai Bhagwan it was found to be a case of culpable homicide not amounting to murder and therefore the appellant was convicted and sentenced under section 304 (Part-II) I.P.C. He was further convicted and sentenced under section 307 I.P.C. for making attempt to commit the murder of Sushil Kumar Sharma.

8- I have heard the learned counsel for the parties and have carefully perused the evidence on record with the help of both the learned counsel and have also gone through the judgment under appeal.

9- Learned counsel for the appellant argued that although the evidence of the prosecution is sufficient to probablize that the occurrence may have taken place at about 8 p.m. on 18-5-1982 but the evidence falls much too short to substantiate that it took place at the site as alleged by the prosecution. To support his argument learned counsel referred to the evidence of investigating officer P.W.7, S.I. Prempal Singh who admitted to have not found any blood at the scene of the occurrence. Ext. Ka.14 is the site-plan prepared by the I.O. The place of the incident is the main road in front of the shop of one Bhagwati Prasad situate in Moti Bazar, P.S. Kotwali, Dehradun. The investigating officer categorically stated that he did not find any blood there at the site of the incident due to the fact that the place was found flooded with water as a result of bursting of water pipe in the vicinity. On account of this the blood which fell on the road must have been washed-off by the flowing water. Even otherwise the incident took place on the main road and due to movement of the pedestrians the blood marks on the road got obliterated and it was naturally not possible for the I.O. to seize blood-stained metalled piece of the road. In a situation like this non-seizure of the blood-stained material of the road has no

effect on the credibility of the evidence of the injured Sushil Kumar Sharma (P.W.1) and other eye witnesses P.W.2, P.W.3, P.W.4 and P.W.6 who all have been consistent in their claim that the incident took place in front of the shop of Bhagwati Prasad on the main road in Moti Bazar of the town of Dehradun. Nothing beneficial to the defence could be brought out from their cross-examination on this point and therefore I am not inclined to accept the argument that the place of the occurrence had been changed in this case. The learned Sessions Judge also appraised the evidence of the prosecution in this regard in proper perspective and recorded his conclusion that the occurrence took place at the time and place as alleged by the prosecution.

10- It was next argued by the learned counsel that there is conflict between the ocular and the medical evidence of the case and this glaring aspect of the matter create grave suspicion in the entire prosecution version and its evidence. Injured Sushil Kumar Sharma (P.W.1) and other witnesses of the fact stated in one voice that only one gun shot was fired and which hit the said injured and deceased Jai Bhagwan. Pointing out to the injury report (Ext.Ka.21) of Sushil Kumar Sharma and also injury report (Ext.Ka.24) of deceased Jai Bhagwan who was also initially examined in the hospital where he later-on succumbed to his injuries, learned counsel submitted that it was not possible that the two injured could have sustained gun shot wounds on different parts of their body from a single fire arm shot and that this aspect of the matter run counter to the claim of the injured and eye-witeness. I see no force in this argument also because the fire arm used was a shot gun and cartridge used was of 12 bore which was sufficiently wide dispersal of pellets and this was the reason that Sushil Kumar Sharma received gun shot wounds on left fore-arm, front side neck, front side chest, right shoulder and on the right upper arm and whereas deceased Jai Bhagwan sustained gun shot entry wounds on the back, on the right upper arm, on the chest and left side back of scapula. Injuries sustained have blackening and charring and the wounds of both the injured were mostly about 1 c.m. in diameter. These peculiar features of the injuries of the two victims conform to the claim of the prosecution that these were caused by single shot fired from a distance of about 4 feet. Therefore, there are no reasons to admit of any inference of conflict in the ocular and medical evidence of the case.

11- Learned counsel also referred to a lacerated wound found on the outer aspect of the left fore-arm and also an abraided contusion on the right side

chest of injured Sushil Kumar Sharma to support his above argument. Again presence of these non-fire arm injuries stand explained by the fact that the injured Sushil Kumar Sharma was pulled down from his bicycle and then shot was fired at by the appellant and therefore there was every possibility of the injured sustaining these injuries also in the process of fall n the metalled road at that time. The presence of these injuries also therefore do not give any weightage to the argument of the learned counsel. In short the ocular evidence of the case is fully corroborated by the medical evidence and the learned trial court also rightly rejected the argument advanced at the stage of the trial on behalf of the defence with a view to discredit the prosecution version and its evidence.

12- Learned counsel for the appellant also made criticism of the evidence of the injured Sushil Kumar Sharma (P.W.1) on the basis of some infirmity with his statement (Ext.Ka.11) which was recorded as dying-declaration while he was admitted in the hospital after the incident. The infirmity according to the learned counsel pertain to the identity of the assailant. In the statement (Ext.Ka.11) the injured had referred to the assailant as the vegetable hawker with regard to the morning incident of 11 a.m. when his ironed clothes were spoiled when he was pushed by the hawker-cart of the vegetable vendor. No doubt the assailant had been referred to as such but in the statement itself the injured had been specific in asserting that the assailant was none other than the appellant Bashir who that very day in the evening at 8 p.m. pulled him down from bicycle and then fired shot from a pistol hitting him and passer-by Jai Bhagwan. Therefore, there is absolutely no such infirmity in that statement which may in any way tell upon his credibility and reliability of his evidence as given on oath in the case. In other words the evidence of the injured is cogent and definite that the appellant had altercation with him in the morning and it was the appellant also who fired at him from a pistol after pulling him down from the bicycle at the time of the incident at about 8 p.m. that day. Sustaining of the injuries by the passer-by has also been affirmed from his evidence which could not be assailed despite searching cross-examinating at length by the learned defence counsel.

13- I also can not lose sight of the fact that the photo-frame shop of his father Kishan Chand Sharma (P.W.3) is not very far from the place of the incident and his presence at the scene of the occurrence is also fully established from his evidence and that of the evidence of P.W.6, Ghanshyam who runs a

medical shop nearby and was engaged in gossiping with him at that time. Both of them have been close to the scene of occurrence and saw the appellant firing shot hitting the injured Sushil Kumar Sharma and deceased Jai Bhagwan and thereafter fleeing from there. The cross-examination of both these witnesses also did not result in bringing on record anyting detrimental to the veracity of their evidence. Not only this, evidence of P.W.2, Ram Bhakt Shastri is also cogent to prove that he saw the appellant Bashir taking out a country made pistol and firing at Sushil Kumar Sharma which hit the said victim as well as a passer-by Jai Bhagwan at about 8 p.m. on that day close to the shop of Bhadbhoojas. On similar pattern evidence of P.W.4, Babu Ram is there on the record and although both these witnesses were cross-examined to show that they are chance witnesses but nothing of significance could be brought on record to shake the confidence which deserved to be reposed in their evidence and credibility. The learned Sessions Judge made no error in placing reliance on the evidence of these witnesses also and in coming to the conclusion that the evidence of the prosecution is sufficient to prove beyond doubt that appellant Bashir fired the shot from pistol hitting not only injured Sushil Kumar Sharma but also a passer-by Jai Bhagwan who ultimately succumbed to the gun shot injuries next evening. It is thus evident that the learned Sessions Judge was justified in convicting the appellant as aforesaid.

14- Lastly it was argued by the learned counsel for the appellant that the sentence awarded to the appellant is severe considering the fact that it is a case of single fire arm shot and no evidence of any cruelty towards the victims. Learned counsel submitted that in the face of the facts of the case the appellant should not have been awarded imprisonment for 10 years, which is maximum punishment provided, for an offence under section 304 (Part-II) I.P.C. The appellant was also awarded sentence of 7 years R.I. under section 307 I.P.C. and considering this aspect and the attending circumstances the ends of justice will be met if the sentence under section 304 (Part-II) I.P.C. is modified and reduced to the sentence for 7 years R.I. also.

15- For the reasons aforesaid the conviction of the appellant Bashir as recorded by the learned Sessions Judge, Dehradun under section 304 (Part-II) I.P.C. and 307 I.P.C. and sentence of 7 (seven) years R.I. under section 307 I.P.C. per judgment dated 10-2-1983 is hereby affirmed. The sentence under section 304 (Part-II) I.P.C. is modified and appellat Bashir is sentenced to R.I.

for 7 (seven) years. The sentences, as directed by the learned Sessions Judge, shall run concurrently. The appeal is disposed of accordingly.

16- The appellant is on bail. His bail bonds are cancelled and sureties discharged. He shall be taken into custody and sent to jail to serve out the sentences as aforesaid.

17- Let the record of the case be sent to the court concerned for compliance. The compliance report be submitted within one month.

(Irshad Hussain, J.)

ISB